Supreme Court of Tennessee.

WILLIAM W. WOODFOLK *vs.* THE NASHVILLE AND CHATTANOOGA RAIL ROAD COMPANY.

1. Where land is taken for a public use, or by a Rail Road Company, in the absence of any special provision, only the quantity of the land appropriated, the place where it lies, with reference to external circumstances, and the form in which it is taken, can enter into the estimate of the damages.

2. But any general effect that the actual or contemplated construction of the road, or special effect of its location at the particular place, may have upon the value of the land, whether to improve or lessen the price, is not to be considered in the valuation.

3. So the incidental injuries or advantages, benefits or injuries caused thereby, are to be left out of view.

The opinion of the Court was delivered by

CAROTHERS, J.—The defendants located their road for about 500 feet on a six acre lot of plaintiff, in the vicinity of Nashville. The road runs through one corner of the lot, separating about three-quarters of an acre from the main lot, and occupying in the bed, which is from seven to ten feet deep, about one-quarter of an acre. The plaintiff has his family residence on the lot, and it is handsomely and beautifully improved. The part separated has upon it some negro houses, a cow house, well and spring house. The plaintiff applied to the Circuit Court of Davidson County, under the Act of 1845, ch. 1, chartering said Company, for the appointment of commissioners to assess the damages sustained by him in consequence of the location of said road upon his land. This was at May Term, 1850, when five commissioners were appointed. At October Term, 1850, the report made by said commissioners was quashed for informalities in their proceedings, and five other men appointed. A majority of these commissioners "assess the loss and damage at $2,000, and that the benefit and advantage the said Woodfolk has received from said road, consisting in the increased value of his said premises, amounts to the sum of $2,500, at least," so they allow him nothing. From this report, he appealed to the

Court, and the cause was tried by a special jury before the Court at January Term, 1852. A verdict was rendered in favor of the plaintiff against the defendants for $750. The defendants moved for a new trial, which was overruled, and now appeal in error to this Court. The bill of exceptions contains the evidence, on which the verdict was founded. It consists of the survey and discription of the lot, the track of the road through it, and the opinions of witnesses as to the injury done to the plaintiff, on the one hand, and the enhancement of the value of his property on the other. The injuries enumerated are of this character: cutting off the plaintiff from his well, spring house, &c., the necessity of moving out buildings, erecting a stone wall in the cut made for the road, to keep up the ground and prevent accidents, detracting from the beauty and comfort of the lot, as a family residence, &c. Against all this, on the other hand, it is proved, that his lot is enhanced in value in the market by the erection of the road, from 25 to 50 per cent. On all these points, the proof is, as it must be, when consisting of the opinions of men on any subject very conflicting and unsatisfactory on all the items of account on both sides. It must necessarily partake more of the nature of guessing than of certainty. The law was laid down by the circuit judge in his charge, in part and so far as it is necessary in our examination, as follows:—You will recur to the testimony and ascertain, from that, the value of the land taken for the road, and take into consideration such other inconveniences and damages as shall have resulted to the plaintiff from the acts of defendants. You will estimate what damages the plaintiff may have suffered, if you shall think that any have accrued, then you will look to the testimony in the cause, and ascertain whether the acts of the defendants in locating the road upon the land of the plaintiff, have resulted in benefit or advantage to him; on ascertaining this, you will determine whether the land of the plaintiff appreciated in value. You will not look to the fact that the road is a public benefit or advantage, unless that public benefit or advantage be inseparable from the benefit conferred upon the plaintiff. If any advantages have resulted, you will determine what they are and assess their value. You will then take the

amount of benefit or advantage from the amount of damages, and the remainder, if any, will make your verdict. In ascertaining the benefits and damages, you will confine yourselves to the time when the defendants appropriated the land of the plaintiff to the use and construction of the road." Thus is the law laid down by the Circuit Court, and both parties are dissatisfied with it. The defendants bring up the case by appeal, and the plaintiff by writ of error. It now devolves upon this Court to settle the law and indicate the proper rules for this and all other cases of the kind, and there will doubtless be many in future, as the spirit of public improvement has now taken possession of the minds of the people, and guides the public councils of our State. They should be such as will guard the rights of the citizens on the one hand, and not improperly impede the cause of public improvement on the other. A wide range has been taken in the argument, evincing learning, research and ability on the part of the counsel, worthy of the importance of the subject, as well as profitable to the Court. We feel much indebted to this full and able examination and presentation of the questions involved, both upon principle and authority, for the opinion we have been able to form on this most vexed and perplexing subject. We have had the advantage of all the lights that could be brought to the elucidation of the questions involved, by the best legal talents and most profound research. It would at this day be worse than useless to enter into a discussion of the existence and extent of the right of eminent domain, and to prove that it is inherent, in this and all other governments. That is now well settled and admitted on all hands to exist in every State and country. No one now questions the right of the State to take private property for public use, against the consent of the owner. Questions frequently arise and may come up again as to the extent and right exercise of this conceded power. But it is not controverted that it applies to the case of public roads, and that rail roads, whether constructed by the State or chartered companies, are of that character. The land of the plaintiff has been taken for this purpose, and was therefore legally and rightfully taken. But he has a corresponding right which is as clear, well guarded and indis-

putable as the other—a claim for the value of his property. The State may take his property for the public use, but the State must see that the public pays him for it. The people, in whom the sovereign power properly resides in this free country, were not willing to leave this dangerous, though essential right of eminent domain, a power to deprive a man of his property against his consent, unguarded by barriers of a permanent nature, inserted in their constitutional restrictions upon it. They impliedly delegate the right, but protect the citizen and secure to him the value of his private property. The provision for this purpose in the Federal Constitution is, "*Nor shall private property be taken for public use without just compensation.*" Amendments Article 5. But this as well as other provisions of the same character, are intended solely as limitations on the exercises of power by the general government and is not applicable to the legislation of the States. The State constitutions are framed by different persons, and have distinct objects in view. The State governments are not restricted by the limitation of a power expressed in general terms in the constitution of the United States. The States must be included in terms, or necessary implication, in such limitations or regulation of powers, or they are not affected, *Barrow* vs. *The Mayor of Baltimore*, 7 Peters 243, 2 J. J. Mar. 45. The constitution of the United States cannot therefore be looked to for the rule to govern us in this case. But the people of this State, and perhaps most if not all the others, being equally jealous of the abuse of power, saw proper to restrict and limit the power of the State government on the same subject. Our people in their State Convention made this provision: "No man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representative, or without just compensation being made therefor." Article 1, sec. 21. The power to take private property for "public use," is here impliedly admitted, and the Legislature undoubtedly possess it with the limitation prescribed, that is by making just compensation. This is only in affirmance of the great principles of the common law. The important and only question in this case is, what is meant by "just compensation?" how is it to be ascertained,

and how, when and in what paid? When this is settled upon, a fair construction of that instrument, it must prevail, and no act of assembly can change or alter it. All laws are subordinate to this supreme law, and must yield to it, as they are null and void when they come in conflict with it. It follows, therefore, if the Legislature attempted in this charter to substitute any other compensation for private property taken for this road or directly or by indirection, deprived the citizen of that "just compensation" in whole or in part, which is secured in the organic law, it has transcended its authority, and trespassed upon sacred ground. If it should be our opinion that this has been done, it becomes our imperious duty, delicate and unpleasant as it may be, to sustain the Constitution which we have sworn to support with a firm hand. That must stand, no matter what else may fall. It must be guarded with untiring and sleepless vigilance from all attacks. Upon the judiciary, this important duty devolves. The people can only look to this department of the government for protection, when their constitutional rights are invaded.

It should be a pleasant, though delicate duty to those they have thus entrusted with the power, to exert it on all proper occasions, for their security against wrong. Then what is the power of the State, and the rights of the citizen in the question now before us? The former may take the private property of the latter for public use, as has been done in this case. The citizen has a concomitant right founded in the constitution to a "just compensation." How is this right to be asserted? It is certainly the duty of the government to provide some fair and proper mode of ascertaining the value of the property taken, where it cannot be agreed upon by the parties, and to make provision also for the payment, when it is ascertained in the mode and manner contemplated by the Constitution. The charter of the defendants was granted in 1845, Ch. 1. The 24th section regulates the mode of ascertaining the damages to individuals, and the manner of compensating them for lands taken for the road. It provides, when the land cannot be purchased, or the price agreed upon, "the same may be taken at a valuation to be made by five commissioners, or a majority of them,

to be appointed by the Circuit Court of the county, where some part of the land or right of way is situated," who shall take an oath faithfully and impartially, to discharge the duty assigned them. In making the said valuation, the said commissioners shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land being taken, or the right of way surrendered, and also the benefit or advantage he may receive from the erection or establishment of the said road or work, and shall state particularly the nature and amount of each, and the excess of loss or damage over and above the benefit and advantage, shall form the measure of valuation of said land or right of way. The proceeding of said commissioners, accompanied with a full description of said land or right of way, shall be returned under the hand and seals of a majority, to the Court from which the commission issued there to remain of record. Either party may appeal and have a new valuation by a jury in Court, whose verdict shall be final, unless a new trial is granted. "And the land or right of way so valued by the commissioners or jury, shall vest in said company in fee simple, so soon as the valuation may be paid, or where refused, may be tendered." It is further provided, that an appeal is not to stop the work, nor can the same be delayed by injunction or supersedeas. But in case the appeal is by the company, surety must be given to pay whatever may be awarded in the Court. Here is a full and vigorous exercise of the power of eminent domain. The fee simple title is vested in the corporation. No objection is made, nor do we see any under the construction that a jury trial in the regular common law mode is adopted in case of appeal, to the provision made in this section for selling the rights of the parties. But the contested and embarrassing question still arises upon the rule prescribed in this law, for ascertaining the "just compensation" to the owner of the land, the use and title of which he is thus forced to surrender to the corporation, on the one hand in making the valuation of the land, the "*loss* or *damages*" which may accrue to the owner by taking the land, is to be fixed, on the other hand, the "benefit or advantage" to the owner from the erection of the road, is to be estimated, and the excess of the former over the latter, in the

language of the Act, "*shall form the measure of valuation of said land.*" Is this the measure of "compensation" prescribed in the Constitution? Was the compensation secured to the owner for the loss of his property, to be paid in money, or may it be made in other property, or incidental "benefits and advantages"—was it intended that the citizen should not only be forced to give up his lands for the common or public use, but to take in payment for it, anything it might suit the party taking it, to offer?

If such be the true meaning of the Constitution, it is certainly a poor protection of private rights against the exactions of power, and is only calculated to excite half-hopes of security. By the Supreme law, the Legislature are empowered, when in their opinion the good of the whole people requires it, and for the use and benefit of the whole, to compel him who owns property to give it up, upon the payment to him, by the same public for whose use it is taken, a "just compensation," or in other words a fair price, or the value in money for the property taken. He cannot be paid off in "benefits or advantages," which are thus forced upon him against his consent. He may be compelled to submit to the encroachment upon his private rights, when they come thus in conflict with the public interests; but with the charter of his liberty in his hand, he can say to the powers that be, "thus far shalt thou come and no farther." In the appropriation of the property, the public power is exhausted. It cannot be allowed to prescribe how much and in what he shall be paid. The value of the thing taken must be assessed by a just and proper tribunal, and the amount paid in the lawful coin of the United States—in money. It is a debt against those who take the property, and must be paid like all other debts. The creditor in this case, cannot be coerced to receive as compensation, ameliorations of his remaining property, or the enhancement of its value, nor any other "benefit or advantage," either real or imaginary, that may be conferred upon him. He may not wish to part with a portion of his land, to have the price of that which remains, enhanced. The increase of price without any improvement of its fertility or beauty, is no advantage to him if he does not wish to sell, it only increases his public burthens in

the way of taxation; what others might regard as a great "advantage and benefit," he might consider a decided injury. If his lands are appreciated, and his facilities of travel and trade increased by this improvement, these are benefits to which he is entitled with the community in general, and for which he has to pay in common with others, in taxes and other burthens. But there can be no good reason why any more should be taken from him than others, for these common benefits. Here we arrive at the conclusion that the plaintiff is entitled to the value of the land taken from him by the defendants, in money, and that this value, when ascertained, cannot be liquidated in whole or in part, by any "benefit or advantage" he may in fact or by supposition derive from the making of the road in the appreciation of his remaining land or otherwise. But on the other hand, it would be unjust to make the public pay the enhanced price that would result from the fact that the road had been located at that place. It is difficult to lay down any very definite rule for the government of commissioners and juries on this subject, which will be of easy practical application in every case, yet it is highly important that some principle be settled, and the extent of its application to peculiar circumstances defined, calculated to produce uniformity, and rid the subject of that vague and indefinite character which now seems to perplex the minds of those who have to act upon it. We consider the proper rule to be this, that the fair cash value of the land taken for public use, if the owner were willing to sell, and the company desired to buy that particular quality, at that place and in that form, would be the measure of compensation.

It is not in the nature of a wrongful taking for which damages are to be assessed, nor is it a claim for any wrong or damage done; but the appropriation of the property is legal and rightful, as much so as if the owner had voluntarily sold it to the company, and the only open question was, what is a fair price for the property, what is its value? Now, from this definition of the nature of the transaction, it will follow that there can be nothing added to the price on account of the unwillingness of the owner to part with his land, or to have the improvement there, or because he may have to build fences and walls, or to be put to inconvenience in getting to his out-

buildings, or have them to remove, or such like inconveniences. These things do not enter into the idea of a just compensation for the property actually taken, but are incidental to it, and are provided for in another form, by this charter, as will be presently shown. These considerations are not to enter into the estimate of the jury to enhance the price, but on the other side, the value is not to be reduced by the consideration that the improvement about to be made will be advantageous to the owner in the amelioration and enhanced value of his remaining land, the increased facility in travel or trade it will afford him, or the location of a depot or a town upon his land. To all these and such other incidental advantages as may result to him, he is entitled in common with other citizens, and for which he pays in taxes and other legal burthens imposed by government. If such special advantages accrue to him in consequence of the public improvement, and that particular location of the road, it is an incident to his right of property, and a benefit for which no one has a right to make him account in fixing the price of other property taken against his will. The following circumstances and considerations should enter into this estimate of value or compensation:

1. The quantity of land taken. It would not be reasonable to fix the price of an acre or the fourth of an acre at the general rate of the whole tract or a larger quantity. This would be selling by retail, and ought to be at a higher price for the quantity taken.

2. The place where the land lies which is thus appropriated, with reference to external circumstances. Is it in the country, a village or city? With reference to remaining land, is it taken on the outer line, with the bed of the road only on the land, or does it run so as to divide the land in a regular or awkward form?—through a garden?—stable, lot, or the family yard?—between the dwelling house and kitchen? or under either of them? and if so, are they of great value, or of but little value? Is it so to run as to cut off from the main lot a portion of ground that for quantity or form is saleable or not? So, upon this point the rule must be as first laid down in general terms, the quantity taken, and place and form in which it is taken, must be looked to in fixing its value.

3. Any general effect that the actual or contemplated construction of the railroad, or special effect of the location of it at that particular place may have upon the value of that land, whether it has been to improve or lessen the price is not to form an element or be considered in the valuation. If the value is elevated by the work, he should not have the advantage of it, because we do not make him account for the increased value of the remainder of his land, and if the value is reduced by it he should not suffer, because he is forced to part with his property for that purpose against his will.

4. The incidental advantages and disadvantages, benefits and injuries are to be left entirely out of view. The owner's unwillingness to sell, or to the location of the road on his land or near his house on the one hand, and the necessity the public is under to have the land at that particular place, on the other, are to have no influence on the price; the property is to be valued on the same principle and considerations, as if both parties had agreed upon the sale, and had referred the single question of the intrinsic value of that particular property to the commissioners, the consideration of his property to which the owner is entitled being thus ascertained, it must be paid to him in money. To compel him to take anything else, would render the constitutional guarantee ineffectual and delusive. Here the constitutional provision ends, its inhibition upon the government goes no further. The Legislature may make any regulations it thinks right and proper for an account or estimate of incidental "loss or damage," or injuries to the land owner. These may consist of the necessity created for building new fences, the removal of buildings, separating him from his spring, well, mill, negro houses, barns, &c. And against this may be set off the "benefits and advantages" to the owner in the enhancement of the value of his remaining land, of the same or any adjoining tract, his increased facilities of travel, &c. We think the Legislature have the power to do this, and if required by the petitioner the Court would be bound under this charter to direct the commissioner, or in case of appeal, the jury, to make the estimate on both sides, upon the basis here stated. But this must be separate and distinct from the valuation of the

land for the purpose of ascertaining the compensation required by the constitution, and cannot be blended with it, nor in any way enlarge or reduce it. It is true that the nature of the items on both sides of this account would be of a very vague and indefinite character, depending before commissioners upon their opinions upon the view and examination of the ground, and before a jury, on appeal, upon the opinions and fancies of witnesses. But for that no remedy or definite rule can be furnished which will clear the subject of its inherent difficulties. But this enhancement of price which may be taken into the account against the petitioner must be confined in the estimate to the lot or tract through which the road runs, or to the lots or lands which adjoin it, and to such improvement in value as is the result of running the road at that particular place, and not to the general use of property in the county or that neighborhood produced by the public work.

That which is common to all, should not be charged to him, because this is an advantage to which he is entitled as a citizen and tax payer of the State.

To these conclusions we are brought by what seems to us a fair construction of our own constitution. And we find that we are fully sustained in them by the Court of Appeals of the State of Kentucky, in the case of *Jacob* vs. *The City of Louisville*, 9 Dana, 114. In that case it is stated that the same principles had been adopted in *Sutton's Heirs* vs. *The City of Louisville*, 5 Dana, 28, and in *Rice* vs. *The Nicholasville, Danville and Lancaster Turnpike Company*, 7 Dana, 81. The language used in the Constitution of Kentucky is substantially the same as ours on this subject. We are aware that in some of the States contrary and conflicting views have been entertained on some of the points now decided. It would be a useless extension of this opinion to review them, as it could be productive of no advantage. The diversity presented may be partly attributed to the different constitutional provisions on the subject, and to the fact that some of the state constitutions are entirely without any such provisions. And again, the legislative enactments, and the form in which the questions have been presented to the Court, were so variant and dissimilar, that the diver-

sity seems at first view to be greater than it really is upon closer examination. But we are fully satisfied with the construction now given, and though we entertain very great respect for decisions of other states, we cannot yield to them an authority any further than they are sustained in our judgment by sound reason and settled principles. For the errors in law above indicated in the charge of the Court below, we reverse the judgment in this case, and remand the cause for a new trial, on the principles laid down in this opinion.

RECENT ENGLISH DECISION.

Court of Queen's Bench, June 18, 1852.

MARDALL *v.* THELLUSON AND ANOTHER, EXECUTORS OF WILLIAM THEOBALD, DECEASED.

1. A debt due to the Defendant as Executor, for money had and received after the death of the Testator, may be set off against a debt due from the Defendant as Executor, which become due from the Testator before his death.
2. Judgment may be moved for non obstante veredicto on a plea of set-off.

Assumpsit against the executors of William Theobald. The first three counts were for work and labor, and for money paid in the lifetime of William Theobald, and upon an account stated with William Theobald in his lifetime. The fourth count was a special count upon a contract made by William Theobald, to hire the plaintiff as servant. The last count was upon an account stated with the defendants as executors. The defendants pleaded (among other pleas) non assumpserunt to the whole declaration; and to the first, second, third, and last counts, a set-off of money had and received for the use of the defendants as executors, and of money due upon an account stated with the defendants as executors. On the trial, before Lord Campbell, C. J., at the Sittings in Middlesex, after Hilary Term, 1852, it was contended for the defendants that there was no evidence to go to the Jury to support the contract stated in the fourth count. The Lord Chief Justice left the evi-